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May 23, 2023

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **FD 36627**
TGS Cedar Port Railroad LLC — Operation
Exemption — Track in Chambers County, Tex.

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is **TGS Cedar Port Railroad LLC's Rebuttal to Union Pacific's "Reply to Opposition."**

If you have any questions regarding this filing, please contact me. Thank you for your assistance on this matter.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish
Attorney for TGS Cedar Port Railroad LLC

RAW:bjs

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36627

TGS CEDAR PORT RAILROAD LLC
— OPERATION EXEMPTION —
TRACK IN CHAMBERS COUNTY, TEX.

**TGS CEDAR PORT RAILROAD LLC’S REBUTTAL TO UNION PACIFIC
RAILROAD COMPANY’S “REPLY TO OPPOSITION”**

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Dated: May 23, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36627

TGS CEDAR PORT RAILROAD LLC
— OPERATION EXEMPTION —
TRACK IN CHAMBERS COUNTY, TEX.

**TGS CEDAR PORT RAILROAD LLC’S REBUTTAL TO UNION PACIFIC
RAILROAD COMPANY’S “REPLY TO OPPOSITION”**

TGS Cedar Port Railroad LLC (“TGSC”) hereby seeks leave to tender a rebuttal (the “Rebuttal”) to Union Pacific Railroad Company’s (“UP”) May 3, 2023 filing in this docket, and, in turn, offers the Rebuttal that follows. UP’s May 3rd filing is a thinly-disguised, 12-page re-argument of its original, 6-page, April 4, 2023 Petition to Revoke as void *ab initio* TGSC’s class exemption. In this latest filing, UP insists that an otherwise impermissible reply to a reply is appropriate here in the interest of a fully-developed record.¹ In the furtherance of such a fully-developed record, TGSC provides the following limited response.

REQUEST FOR LEAVE TO TENDER A REBUTTAL

UP’s current filing is plainly a reply to a prior reply filing in this docket: “TGS Cedar Port Railroad LLC’s Verified Reply in Opposition to Union Pacific Railroad Company’s Petition to Revoke” (the “TGSC Reply”). It is not entirely clear how UP managed to read out the phrase “Verified Reply” from the document’s title. In fact, UP has simply re-characterized the TGSC Reply to gloss over the fact that its own filing really is a prohibited reply to a reply under 49 C.F.R. § 1104.13(c). UP claims its Sur-reply addresses alleged “factual and legal errors

¹ UP “Reply to Opposition and TGSC Request for ‘Confirmation’” May 3, 2023 (herein, the “Sur-reply”), 1 n. 1.

contained in” TGSC’s and BNSF Railway Company’s (“BNSF”) respective April 24, 2023 pleadings, including “errors” arising out of allegedly “new issues.” UP fails to identify which issues are newly-raised in the April 24 filings. Instead, UP has attempted to usurp the Board’s role in determining which legal arguments among the various permitted filings are valid and controlling and which are in error.² Plainly worried about the adequacy of its case-in-chief, UP’s Sur-reply (in which UP assiduously conceals its true motivation) re-packages and re-argues its case, unfurling strange new arguments intended to justify the anticompetitive measures that UP would have this Board agree are (allegedly) at UP’s disposal. TGSC does not object to the filing of the Sur-reply, provided that, in the interest of the development of the full record for which UP advocates, TGSC is permitted leave under the same principle to submit the following Rebuttal.

REBUTTAL

On its face, UP’s Petition to Revoke (the “Petition”) is predicated on the disputed assertion that UP is entitled to block TGSC-BNSF interchange at the TGS Cedar Port Industrial Park (the “Park”), solely because of TGSC’s common carrier status. The Park is a long-recognized 2-to-1 location,³ such that the exercise of UP’ asserted right would eliminate competition for line-haul service between BNSF and UP that Park customers have enjoyed for

² See e.g., *BNSF Railway Company — Abandonment Exemption — in Oklahoma County, Oklahoma*, AB 6 (Sub-No. 430X) (STB served Jan. 26, 2007), 2 (“Although purportedly filed to address alleged misrepresentations of the record and mischaracterization of the decisions cited . . . petitioners’ . . . filing is an impermissible reply to a reply We find no reason to make an exception to our rules here. The Board can determine whether a party has properly relied upon a particular decision or group of decisions, and thus a reply to a reply addressing alleged mischaracterizations of cited cases does not warrant a departure from our rules.”).

³ UP’s Petition openly admits that the Park is a 2-to-1 location. Petition, 3 (“Baytown was identified as a “2-to-1” point in the Union Pacific/Southern Pacific merger.”) (citing the RASA). For the elimination of any doubt on the subject, TGSC refers the Board to the map appended as Exhibit A to BNSF’s May 15, 2023 letter filing (the “BNSF May 15 Filing”), showing how, before and as of 1996, UP and SP each reached what is now the Park via separate railroad lines.

years. UP argues that – (1) it agreed with BNSF under the terms of the RASA that 2-to-1 locations like the Park would forfeit their access to a competitive BNSF line-haul service option if the location were to opt to install a common carrier switching railroad in place of an existing private switching carrier (as the Park owners have done); and (2) the Board knowingly accepted such a competition-eroding arrangement in approving the RASA. If UP’s arguments⁴ were correct (and if BNSF’s interpretation of its rights under its separate agreements for operations over the 50/50 Line were incorrect), then TGSC’s notice of exemption filing would be materially false. On the other hand, if TGSC is correct that about the RASA (or if BNSF is correct about its 50/50 Line rights), then TGSC’s exemption filing is accurate, and UP is not entitled to interfere with TGSC-BNSF interchange. If the Board were to desire further input on the issues beyond the more “fully-developed” record UP has proposed with its Sur-reply, then the agency is entitled at its discretion to solicit additional public comment as part of this revocation proceeding. If need be, the Board may exercise its discretion to reopen *UP/SP* to address the competitive issues arising here.

The arguments that UP now makes in its Sur-reply are strange and off-base, sometimes amusingly so. UP strives to distract from the fact that, if it were to have its way, it would be entitled to (and evidently would) eliminate competition at a 2-to-1 UP/SP location. But

⁴ It is worth noting here that UP’s Petition seeks revocation of TGSC’s class exemption, because the notice TGSC filed last year allegedly contains material statements regarding the absence of any competitive impact from the transaction that UP has contended are false. Petition, 4 (“TGSC’s verified notice of exemption contains the materially false statement that if TGSC institutes common carrier operations over the Line, shippers in the TGS Cedar Port Industrial Park (the Park), will continue to have the same access they currently have . . .”). In its Sur-reply, UP has tiptoed away from the allegation in its case-in-chief, to suggest that maybe TGSC’s notice of exemption filing is merely misleading. UP has not rescinded the arguments of its case-in chief. But even UP had argued in its Petition that the disputed passages were misleading (but not necessarily false), such an allegation would be disproven if the Board were to conclude that those passages were accurate.

even this effort at misdirection through textual sleight of hand obscures a larger point concealed by all off the discussion of competition. In fact, what UP wants is not to eliminate competition where it exists, but rather to force the restoration of private switching at the Park in place of TGSC's common carrier operation. But even if taken at face value, UP's Sur-reply arguments simply do not hold up under even casual observation.

UP seeks Board permission to be a bottleneck carrier, not TGSC.

TGSC provides common carrier terminal switching services at the Park,⁵ having taken over operations as of April 1, 2023, in place of TGSC's private carrier corporate affiliate, Trans-Global Solutions, Inc. ("TGSI"). While UP misleadingly suggests otherwise,⁶ neither BNSF nor UP has ever directly served the Park's many customers. The in-Park substitution of TGSC for TGSI, ***absent a UP-threatened interchange blockade***, has no bearing on competition. The transition preserves the competitive and service *status quo*. TGSC has not become a bottleneck carrier as UP would have it,⁷ and there is no diminution of competition through

⁵ "Switching railroads generally are agents for the line-haul carriers for the purpose of completing delivery or originating traffic, particularly when the latter absorbs the switching charge." *Sioux City & N. O. Barge Lines, Inc. v. Chicago & N.W. Ry. Co.*, 303 I.C.C. 537, 545-546 (1958); *Union Stock Yard & Transit Co. of Chicago v. United States*, 308 U.S. 213, 220 (1939) ("It is not important, as appellant seems to think, that, as an incident to the service it renders to shippers and to the line-haul carriers, it acts as agent of the latter. The character of the service, in its relation to the public, determines whether the calling is a public one, and a common carrier does not cease to be such merely because in rendering service to the public it acts as the agent of another.") (citing *United States v. Brooklyn Eastern Dist. Terminal*, 249 U.S. 296 (1919)).

⁶ Sur-reply, 3.

⁷ *Id.* Given TGSC's terminal switching carrier status, UP seems unwilling or unable to grasp that it (and not TGSC) would be the bottleneck carrier in the world that UP envisions. See *Canexus Chemicals Canada L.P. v. BNSF Railway Company*, NOR 42131 (STB served Feb. 8, 2012, 11 at n. 54 ("CN is the first carrier to accept the traffic from Canexus . . . but it performs only a switch there, and the shipper did not ask it for line haul service . . ."); *Id.* at 11 ("Thus, BNSF is effectively the originating carrier.")).

TGSC's commencement of common carrier operations. Moreover, no one has claimed that TGSC has accumulated, or would accumulate, market power to permit it to engage in anti-competitive behavior. In fact, by UP's twisted logic, each and every 2-to-1 short line that *is* listed in the RASA as entitled to interchange access to BNSF and UP should have been *denied* such protection, as each is (in UP's incorrect view) a "bottleneck carrier."

UP's bewildering claim ignores the fact that the Park is among several logistics facilities and industrial parks in the greater Houston area (and the mid-Gulf region) that competes for customers. The Park's direct access to BNSF and UP line-haul service is a critical competitive consideration. UP knows and admits in its Petition that, if it were to exercise its asserted BNSF-interchange-blocking rights, its actions would make it a bottleneck carrier.⁸ If in its Petition UP meant something *other than* that it would be entitled to assert bottleneck carrier status by blocking TGSC-BNSF interchange, then TGSC no longer comprehends what UP meant when it stated that "Union Pacific would not be required to . . . replicate the head-to-head competition that exists today or could otherwise have developed as new shippers locate in the Park." When UP's smokescreen is dispersed, it is clear that the only anticompetitive effect of TGSC's operations would arise if UP were entitled to assert bottleneck carrier status.

The RASA does not prove (much less prove definitively) UP's contention that the RASA entitles UP to block TGSC-BNSF interchange under the applicable facts.

UP's argues (and re-argues in the Sur-reply)⁹ that the RASA *specifically* contemplated and addresses the facts of this particular case, and that, in so doing, the Board-

⁸ "Union Pacific *might be obliged to provide access*. . . [h]owever Union Pacific *would not be required to short haul itself to replicate the head-to-head competition*" Petition, 6 (emphasis added).

⁹ Sur-reply, 3-5.

approved RASA compels the outcome UP seeks. The best that UP can offer in its defense is to suggest that the RASA’s lists of 2-to-1 short lines as they existed in 1998 was intended to preclude the formation of any new 2-to-1 short line at a 2-to-1 location (such as the Park), where railroad service has been provided by a private switching carrier, *unless* that short line were to build a new line to a “Trackage Rights Line” as defined in the RASA. But UP’s RASA argument is not definitive on the issue, UP’s hollow claims notwithstanding.

Rather, unable to offer any clearly controlling RASA passage, UP nakedly insists that, because the RASA does not explicitly state that TGSC *can* become a 2-to-1 short line serving an existing 2-to-1 location, then TGSC cannot become a new 2-to-1 short line. But UP cannot explain how that argument comports with protecting competition at 2-to-1 locations, why the Board would have endorsed such an outcome, or why short lines that build to a Trackage Rights Line are exclusively accorded protections not extended to short lines created to operate on tracks that already possess such a functioning connection.¹⁰

¹⁰ In haplessly trying to explain itself here, UP is at its most absurd. According to UP, the controlling consideration – an unproven claim, incidentally, for which UP offers no contemporaneous supporting evidence – is that the new carrier-BNSF interchange would require UP to bear “potential [operational] burdens” only avoided through the process of a railroad line construction proceeding. Sur-reply, 6-7. This newly-invented idea, reaching as far back as UP’s April 4, 2023 Petition (see *id.* at 7 and n. 22), is pure speculation. UP knows (and has not disputed) that TGSC’s interchange does not deviate from the manner in which TGSI had effectuated traffic exchanges with UP and BNSF as a private carrier. UP feebly argues that, as with any interchange arrangement, well, *things could change*. But there is no interchange issue now at Bayport, and there is little chance of a problem in the future, either. UP cynically assumes that TGSC would purposely make changes to the manner of its interchange operations, compromising interline service fluidity, and harming service on TGSC’s largest interchange partner, UP. That UP would presume that a carrier (including UP itself) would undertake self-serving operating changes with callous regard for interline service fluidity and customer impact is a poor reflection of UP’s perspective on railroad service in general.

UP seeks to eliminate existing competition, and not to protect against some supposed “expansion” of “BNSF’s limited rights to interchange with short lines.”¹¹

If TGSC understands the most-repeated theme of UP’s Sur-reply, UP would like the Board to assume that the present revocation proceeding is not about whether UP would be entitled to eliminate competition by securing all line-haul service to and from the Park for itself (although that is exactly what this case is about). Rather, UP insists that it is holding the line against the possible, unwarranted *expansion* of BNSF’s limited competitive access rights.¹² Simply repeating the bogus proposition *ad nauseam*, as UP has done, does not make it true.

No matter how UP tries to spin it, Park customers have enjoyed direct access to BNSF through TGSI for years. This revocation proceeding is not about anything that BNSF is *gaining*. Functionally, BNSF gains nothing. It is about the *competition elimination* that UP is proposing. UP is advocating for the right to eliminate a 2-to-1 location to UP’s competitive, commercial, and strategic advantage because it does not want to deal with a new railroad common carrier at the Park, and because UP hopes that the Board will advance UP’s preference. UP offers no agency precedent to support the proposition that the Park, a 2-to-1 location, could or should forfeit its protected competitive status, replicating the competition that existed at this location as between UP and SP at the time the two companies were merged, simply because of the legal nature of the terminal switching service provided within the Park.

¹¹ Id., 8.

¹² See, e.g., id., 4 n. 11; (“Section 8(k) of the RASA was intended to expand BNSF’s interchange rights”) (emphasis in original); 5; 7 (the Park does not need to establish TGSC to afford BNSF “the benefit of access to shippers”); 8 (twice); 9 (“TGSC also offer no support for its claim that Union Pacific promises to expand BNSF’s interchange rights.”); 10; and 11 (three times).

UP is correct in the abstract that, if TGSC's common carrier operations result in diminished competition, the Board will have sanctioned such a result.

The Sur-reply's second-most-repeated (false) claim is that, according to UP, any diminution in competition would be the Board's fault.¹³ UP's argument is that, by allowing TGSC's operating class exemption to take effect, the Board has entitled TGSC to become a "bottleneck carrier." UP's wholly baseless argument about TGSC's supposed bottleneck carrier status is dispensed with above. Again, the TGSC-for-TGSI operational swap, by itself, is of no competitive consequence.

But the underlying point of UP's line of argument is true. If TGSC's exemption were to be upheld, *and* if at the same time the Board were to agree that UP were entitled to block TGSC-BNSF interchange (the Park's protected 2-to-1 status notwithstanding), then the Board's actions would eliminate line-haul service competition between BNSF and UP. In sum, if the Board were to agree with UP's interpretation of the RASA, then the agency must either be content with the outcome, or else the Board should consider doing as TGSC and BNSF previously have each suggested,¹⁴ and reopen the *UP/SP* proceeding to address what TGSC would presume to be an unintentional anticompetitive consequence of the RASA's current terms.

¹³ See, e.g. *id.*, 3 ("By authorizing TGSC's operation as a common carrier, *the Board made TGSC a bottleneck carrier.*") (emphasis in original) and again later on this same page; 5 ("The access issue here arose only *by virtue of the Board's decision . . .*") (emphasis in original) (also misstating Board procedure, in that class exemption notices, including this one, are customarily issued by a Director's Order, not a Board "decision"); 8; 9; and 11 (raised in three passages).

¹⁴ UP May 15 Filing ("If the Board deems it necessary to reopen the UP/SP merger approval decision, as UP suggests in its sur-reply at 11, in order to clarify that UP cannot disenfranchise customers in this manner, then BNSF would welcome the opportunity to explain why the Board should take such a step.").

CONCLUSION

UP for decades has recognized the protected 2-to-1 status of the Park, a location that was commonly served by UP and SP (via separate tracks reaching the same connecting point to the Park). No matter how the case is presented, by any logical measure, UP is asking the Board to uphold UP's asserted right to block the Park customer's existing access to BNSF line-haul service. UP is seeking the Board's endorsement to act anticompetitively. In its Petition, UP owned up to what it was seeking to do, acknowledging its own competition-eroding initiative, but not in its Sur-reply, where UP blames mainly the Board for any anticompetitive outcome.

UP's RASA-based arguments obscure its true motivation. Even if UP had the right to block TGSC-BNSF interchange – and it doesn't – UP could forego the exercise of that asserted right if it wanted to. Functionally, TGSC is furnishing virtually the same transportation services within the Park as TGSI. Also, TGSC is effectuating interchange with UP and BNSF in functionally the same manner as TGSI had done, albeit now on an inter-carrier basis. UP's insistence on blocking TGSC-BNSF interchange to UP's competitive advantage would be an opportunistic, anticompetitive maneuver to be sure, but it's not the real story. If UP had its way, TGSC's class exemption would be revoked *ab initio*, invalidating TGSC's common carrier status from the outset, and forcing the return of the TGSI-as-private-carrier *status quo ante*. Park customers would retain (through TGSI) direct, competitive access to UP and BNSF line-haul service. Logically, then, UP's effort is not about *competition* at all. It is about trying to force the Park to resume private switching operations.

UP considers TGSC's common carrier operations to be commercially disadvantageous to UP compared to TGSI's private carriage – sufficiently so that UP has decided

to make a stand here. The revocation request is a means to an ulterior UP end, and it is unclear whether UP's efforts are strictly focused upon TGSC or whether they may (as it appears) reflect in UP a more global resistance to new, connecting short line operations in place of existing private carrier operations. TGSC previously outlined in considerable detail the various comparative service benefits driving the decision to commence common carrier operations.¹⁵ Through legal indirection, UP has pitted the benefits of TGSC common carriage against UP's commercial prerogative. Favorable action on UP's Petition, therefore, would not deprive TGSC's customers of competition. It would instead deprive those customers and TGSC of the benefits flowing uniquely from TGSC's common carrier status. TGSC urges the Board to be mindful of these public interest considerations as the record closes and it acts upon the substance of the Petition.

For the foregoing reasons, UP's Petition is without merit and should be denied.

Respectfully submitted,

By: /s/ *R. A. Wimbish*

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RAILROAD LLC**

Dated: May 23, 2023

¹⁵ TGSC Reply, 6-7.

CERTIFICATE OF SERVICE

I certify that on May 23, 2023, I caused TGS Cedar Port Railroad LLC's foregoing Rebuttal to be electronically filed with the Surface Transportation Board and served via electronic mail on the following persons:

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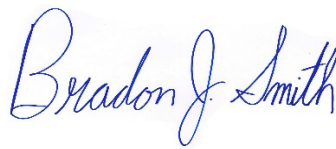
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